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Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1289

NATIONAL RAILROAD PASSENGER CORPORATION,
CENTRAL OF GEORGIA RAILWAY COMPANY,
AND SOUTHERN RAILWAY COMPANY,
Petitioners,

v.

NATIONAL ASSOCIATION OF RAILROAD PASSENGERS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF FOR THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AS *AMICUS CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* FOR THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

To: The Supreme Court of the United States

Pursuant to Supreme Court Rule 42(3), the National Association of Regulatory Utility Commissioners (NARUC) respectfully moves the Court for leave to file the brief, accompanying this motion, as *amicus curiae* in the above-entitled cause and shows:

Similarly, trains in the basic system which Amtrak proposes to discontinue after July 1, 1973 may not be discontinued if "State, regional, or local agencies request continuation of the service and within ninety days agree to reimburse the Corporation for a reasonable portion of any losses . . . ." 45 U.S.C., § 564(b)(3).

In addition, trains in the basic system [including those trains added to the original basic system in accordance with 45 U.S.C., § 563(a)], which Amtrak proposes to discontinue after July 1, 1973, cannot be discontinued unless the procedures of Section 13a of Title 49 are employed. 45 U.S.C., § 564(b)(3). Similar provision is made for proposed discontinuances by non-contracting railroads after January 1, 1975. 45 U.S.C., § 564(a). With certain exceptions not important here, Section 13a provides that railroads must apply to State Commissions for authority to effect discontinuances of intrastate trains, and must apply to the Interstate Commerce Commission for authority to discontinue interstate trains. In regard to decisions made by the I.C.C. in Section 13a proceedings, this Court has upheld the right of aggrieved parties, including State commissions, to appeal such decisions. *City of Chicago v. United States*, 396 U.S. 162 (1969).

The NARUC was permitted by this Court to file an *amicus curiae* brief in the *City of Chicago* case, *supra*.

The question, then, of the extent of access to the courts by parties aggrieved by violations of the Act by Amtrak or a railroad is of considerable importance to State regulatory commissioners across the country. The judicial landmark to be established by the Court in the disposition of this case will have a direct effect on the ability of State authorities to protect local interests in the development and maintenance of adequate rail passenger service.

Wherefore, it is respectfully submitted that this Court should grant leave for the filing of a brief by the National Association of Regulatory Utility Commissioners, as *amicus curiae*, in this case.

Dated this 4th day of September, 1973.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 475 F.2d 325. The order of the District Court, issued on May 5, 1971, is unreported.

QUESTION PRESENTED

Does Section 307 of the Rail Passenger Service Act of 1970 (the "Amtrak Act") bar suits by injured and aggrieved parties to obtain equitable relief against the National Railroad Passenger Corporation and/or the railroads for violations of the Amtrak Act, other than suits instituted upon petition of the Attorney General of the United States or, in a case involving a dispute over a labor agreement, upon petition of an employee or duly authorized employee representative?

STATUTE INVOLVED

Involved in this case is Section 307 of the Rail Passenger Service Act of 1970, 84 Stat. 1333, the title of which, as enacted, differs from that presented in petitioners' brief. Section 307 of the Amtrak Act provides as follows:

> SEC. 307. SANCTIONS.
>
> (a) If the Corporation or any railroad engages in or adheres to any action, practice, or policy inconsistent with the policies and purposes of this Act, obstructs or interferes with any activities authorized by this Act, refuses, fails, or neglects to discharge its duties and responsibilities under this Act, or threatens any such violation, obstruction, interference, refusal, failure, or neglect, the district court of the United States for any district in which the Corporation or other person resides or may be found shall have jurisdiction, except as otherwise prohibited by law, upon petition of the Attorney General of the United States or, in a case involving a labor agreement, upon

petition of any employee affected thereby, including duly authorized employee representatives, to grant such equitable relief as may be necessary or appropriate to prevent or terminate any violation, conduct, or threat.

(b) Nothing contained in this section shall be construed as relieving any person of any punishment, liability, or sanction which may be imposed otherwise than under this Act.

THE INTEREST OF THE NARUC AS *AMICUS CURIAE*

The NARUC is a quasi-governmental nonprofit organiza- founded in 1889. Within its membership are the governmental bodies of the fifty States and of the District of Columbia, Puerto Rico and the Virgin Islands engaged in the regulation of carriers and utilities. The mission of the NARUC is to improve the quality and effectiveness of public regulation in America. More specifically, the NARUC contains State officials charged with the duty of regulating rail transportation within their respective States and, as such, they normally have the obligation to assure the establishment and maintenance of such rail transportation and facilities as may be required by the public convenience and necessity, and the furnishing of service at rates and charges that are just and reasonable.

As indicated on pp. 8-10, *infra*, the Rail Passenger Service Act of 1970 considerably affected the traditional regulatory responsibilities of State authorities over rail passenger service. Certain provisions of the Act reduced the role of State authorities in regulating such service within their respective jurisdictions. See, *e.g.*, Sections 306(c) and 404(a) of the Act, 45 U.S.C., §§546(c) and 564(a).

Other provisions of the Act explicitly recognized the importance of continuing a strong role for State authorities in the regulation and development of rail passenger service in this country. See, *e.g.*, Section 202, 45 U.S.C., §522, concerning the designation of the basic system; Section 306(b), 45 U.S.C., §546(b), concerning the continuing applicability of State safety laws and regulations; Sections 403(b) and 404(b)(3), 45 U.S.C., §§563(b) and 564(b), concerning the options made available to State authorities to ensure the continuance of those trains which Amtrak proposes to discontinue; and the provisions [45 U.S.C., §§546(c), 564(a), 564(b)(3)] making discontinuances, once the basic system had been designated and established, subject, with minor modifications, to the more normal procedures of Section 13a of the Interstate Commerce Act.

Accordingly, the decision by the Court of the issues in this case will be of paramount regulatory importance and will have a substantial effect on the ability of State agencies to protect the public interest in the availability of intercity rail passenger service. Therefore, the members of the NARUC, as government regulators, are vitally concerned with these issues and the precedents which will be established by their resolution.

STATEMENT OF THE CASE

This is an action instituted by the National Association of Railroad Passengers (NARP) to enjoin the discontinuance of trains by the Central of Georgia Railway Company. The trains involved include the "Nancy Hawks" passenger train operated between Savannah and Atlanta, Georgia, and two trains operated between Albany, Georgia and Birmingham, Alabama. The National Association of Railroad Passengers,

respondents herein, charged that the proposed discontinuances violated Sections 404(a) and 802 of the Amtrak Act, 45 U.S.C. §§564(a) and 642, in that the discontinuances were not being implemented pursuant to a contract entered into between Southern Railway Company (Southern) and Amtrak in accordance with Section 401(a)(1) of the Act, 45 U.S.C., §561(a)(1), but rather pursuant to a contract between Amtrak and a subsidiary of Southern, the Central of Georgia Railway Company (Central).

The District Court below never reached the merits of the case, having dismissed the action on the ground that the NARP had no standing to maintain the action under Section 307 of the Act. On appeal, the United States Court of Appeals for the District of Columbia reversed and remanded the District Court's decision.

Rail Passenger Service Act of 1970

The Rail Passenger Service Act of 1970 was enacted amidst extensive concern across the country that rail passenger service was rapidly becoming a "thing of the past." Why such a development was occurring was subject of extensive debate at that time. In its Report accompanying H.R. 17849, the bill eventually enacted into the Rail Passenger Service Act of 1970, the Committee on Interstate and Foreign Commerce stated:

> Again it is emphasized that there are many reasons for the downward trend in passenger train usage. The railroads have been accused of downgrading service in a deliberate attempt to support elimination of passenger trains, the costs to the railroads have

> increased sharply. Our highly improved highway and air transportation services have made deep inroads into the rail passenger traffic. H.R. Rep. No. 91-1580, 91st Cong., 2nd Sess., p. 3 (1970).

Concerned, among other things, by the pollution caused by other modes of transportation,[1] Congress emphasized that the purpose of the bill was to save and promote rail passenger service, and also emphasized that State and local authorities would play a major role in such an effort:

> That is the intent of this bill. It envisions a completely new effort to save and promote rail passenger service. *The corporation, described in detail elsewhere in this report, will undertake the responsibility for providing the rail passenger service of the future, and it will be free to go beyond the original basic system, particularly where State, regional, or local authorities are willing to provide financial assistance for any deficits incurred for service which they desire.* Acting over a unified system the corporation should expect and achieve immediate improvements in such areas as ticketing and reservations. New equipment can be purchased, roadbeds improved, terminals modernized, and upgrading in the quality of service can be achieved. (See Secretary

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[1] "To solve the problems arising from the side effects of our several modes, such as pollution and congestion, we must preserve and improve the neglected and older form of railroad service." H.R. Rep. No. 91-1580, *supra*, p. 2.

> Volpe's testimony, Hearings *supra*, page 69). H.R. Rep. No. 91-1580, *supra*, p. 3. (Underscore supplied).

To the Congress, it appeared that curtailment of all rail passenger service was imminent. As the Committee on Interstate and Foreign Commerce stated:

> This nation is faced with the immediate threat of complete curtailment of rail passenger service. H.R. Rep. No. 91-1580, *supra*, p. 2.

During the summer of 1970, for example, such fears were buttressed by the proceeding before the Interstate Commerce Commission, in which the proposal by Penn Central to discontinue a large portion of its passenger train service was under investigation. The proposal was substantially approved in *Penn Central Transportation Co. Discontinuance*, 338 I.C.C. 380.

Congress faced the immediate threat by ordering a moratorium on all train discontinuances until at least May 1, 1971. Within thirty days after the passage of the Act (October 30, 1970), the Secretary of Transportation was required to prepare a preliminary report and recommendations for a basic system of intercity rail passenger service, and to submit such report to the Interstate Commerce Commission and Congress. Section 201, 45 U.S.C., §521. The I.C.C., State Commissions, and labor representatives were given only thirty days to review and comment upon the preliminary report, and the Secretary was required to submit a final report to Congress within ninety days of the passage of the Act. Section 202, 45 U.S.C., §522. If Amtrak entered into a contract, pursuant to Section 401 of the Act, 45 U.S.C., §561, with a railroad to

relieve it of responsibility for service prescribed for the basic system, Amtrak was forbidden to discontinue such service until at least July 1, 1973. Section 404(b), 45 U.S.C., §564(b). Railroads not entering into contracts with Amtrak to relieve them of responsibility for passenger service were forbidden to discontinue any service until at least January 1, 1975. 45 U.S.C., §564(a).

Furthermore, and very importantly in this case, Congress specifically provided that "The basic system as designated by the Secretary . . . shall not be reviewable in any Court." Section 202, 45 U.S.C., §522.

In the manner described above, Congress prevented the imminent from occurring, *i.e.*, "complete curtailment of rail passenger service" across the country. The preservation of a basic system was assured for nearly three years – October 30, 1970 to July 1, 1973; and the components of the basic system, as designated by the Secretary, were not to be contested in any court.

After assuring the maintenance of a basic system until at least July 1, 1973, Congress then made it abundantly clear that State and local authorities, among others, were to play a major role in the future development of the nation's rail passenger service. Amtrak, for example, was prohibited from discontinuing any trains in the basic system after July 1, 1973, whenever State, regional, or local agencies, after receiving notice of the proposed discontinuance, "request continuation of the service and within ninety days agreed to reimburse the Corporation for a reasonable portion of any losses associated with the continuation of service beyond the notice period." Section 404(b)(3), 45 U.S.C., §564(b)(3).[2]

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[2] Section 404(b)(3) reads:

"Discontinuance of Service . . . (continued)

Similarly, concerning rail service in addition to that prescribed for the basic system, Amtrak is required to provide such service upon the request of, and appropriate reimbursement of a portion of the losses by State, regional, or local agencies. Section 403(b), 45 U.S.C., §563(b).[3] By a 1972 amendment to Section 403(a) [45 U.S.C., §563(a)] of the Act, the Corporation was directed to ". . . cooperate with State, regional, and local agencies to encourage the use of trains [outside of the basic system] and [to] make reasonable

---

[2] (continued)

(3) If at any time after July 1, 1973, the Corporation determines that any train or trains in the basic system in whole or in part are not required by public convenience and necessity, or will impair the ability of the Corporation to adequately provide other services, such train or trains may be discontinued under the procedures of section 13a of Title 49: *Provided, however,* That at least thirty days prior to any change or discontinuance, in whole or in part, of any service under this subsection, the Corporation shall mail to the Governor of each State in which the train in question is operated, and post in every station, depot, or other facility served thereby notice of the proposed change or discontinuance. The Corporation may not change or discontinue this service if prior to the end of the thirty-day notice period, State, regional, or local agencies request continuation of the service and within ninety days agree to reimburse the Corporation for a reasonable portion of any losses associated with the continuation of service beyond the notice period."

[3] Section 403(b) reads:

"New Service . . .

(b) Any State, regional, or local agency may request of the Corporation rail passenger service beyond that included within the basic system. The Corporation shall institute such service if the State, regional, or local agency agrees to reimburse the Corporation for a reasonable portion of any losses associated with such services.

efforts to assure high quality of customer services." See Section 6, Public Law 92-316, 86 Stat. 229.

Disagreements between Amtrak and State and local authorities as to the extent of reimbursement to be paid by those authorities for the continuance of trains in or beyond the basic system are to be referred to the Secretary of Transportation for decision. 45 U.S.C., §§563(c), 564 (b)(4).

In addition, proposed discontinuances by Amtrak of trains in the basic system after July 1, 1973, were explicitly made subject to the procedures of section 13a of the Interstate Commerce Act (49 U.S.C., §13a), as were any proposed discontinuances, after January 1, 1975, by railroads which had not entered into contracts with Amtrak pursuant to 45 U.S.C., §561(a)(1). See Sections 404 (a) and 404(b)(2) of the Act, 45 U.S.C., §§564(a), 564 (b)(2).

ARGUMENT

I.

ANALYSIS OF THE LANGUAGE AND LEGISLATIVE HISTORY OF SECTION 307 DOES NOT LEAD TO A CONCLUSION THAT CONGRESS *CLEARLY* INTENDED TO BAR SUITS AGAINST AMTRAK AND THE RAILROADS, FOR VIOLATIONS OF THE ACT, BY PARTIES OTHER THAN EMPLOYEES, THEIR REPRESENTATIVES, OR THE ATTORNEY GENERAL.

The Court below, in a thorough and exhaustive analysis of the language and legislative history of Section 307, rejected petitioners' contentions that Section 307 clearly bars all suits for violations of the Amtrak Act, other than

those instituted by the Attorney General or, in labor agreement controversies, by an employee or an employee representative. (SA[4] 28-39).

Although the enabling act creating Amtrak declared that the Corporation is not an "agency or establishment of the United States government," (45 U.S.C., §541), there is little doubt about the extensive public interest in the operations of the Corporation and the "quasi-public" nature of its organization.[5] It is essential, then, that Amtrak be held strictly accountable for its activities not only before Congress, *but also before the courts by parties aggrieved by its actions*, unless Congress has clearly mandated to the contrary.

Since a basic question involved in this case is the interrelationship of the intent of Congress with the ordinary right of access to the courts by parties aggrieved by actions taken by agencies created by Congress, this Court's statement, in *Barlow v. Collins*, 397 U.S. 159, 166-167, 25 L. Ed. 2d 192, 199-200, 90 S. Ct. 832 (1970), concerning the right to judicial review of actions taken by a governmental agency, is particularly appropriate:

> In *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140, 18 L. Ed. 2d 681, 686, 87 S. Ct. 1507, we held that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." A clear command of the statute will

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[4] "SA" refers to Single Appendix to petitioners' brief.

[5] For example, the Corporation continues to be financed by the U.S. Treasury and by means of Government guarantees on corporate obligations. See 45 U.S.C., §§601-2. 45 U.S.C., §543(a) provides for the Presidential appointment of a majority of the Board of Directors.

> preclude review; and such a command of the statute may be inferred from its purpose. *Switchmen's Union v. National Mediation Board*, 320 U.S. 297, 88 L. Ed. 61, 64 S. Ct. 95. It is, however, "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent" that the courts should restrict access to judicial review. *Abbott Laboratories v. Gardner, supra*, at 141, 18 L. Ed. 2d at 687. The right of judicial review is ordinarily inferred where congressional intent to protect the interests of the class of which the plaintiff is a member can be found; in such cases, unless members of the protected class may have judicial review of statutory objectives might not be realized. See the *Chicago Junction Case*, 264 U.S. 258, 68 L. Ed. 667, 44 S. Ct. 317; *Hardin v. Kentucky Utilities, supra*.

The relatively recent assault by the courts on the "standing" obstacle to obtaining judicial review by aggrieved individuals has also extended to the standing of organizations, such as the respondents in this case, to vindicate the rights of its members in judicial proceedings.[6]

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[6] In granting standing to an association in *National Automatic Laundry and Cleaning Council v. Shultz*, 443 F.2d 689 (D.C. Cir. 1971), the court stated at 693, 694:

> . . . [The] revision of judicial thinking on the standing question has been accompanied by an adjunct line of cases that show a wide disposition to allow associations to appear as representatives of their members and to grant them standing to seek to vindicate the

(continued)

In this case, it is obvious that "clear and convincing evidence" of Congressional intent to limit severely judicial review of Amtrak's actions simply does not exist.

The language of Section 307[7] does not specifically exclude all parties aggrieved by action of Amtrak or a railroad from bringing suit. It does not, for example, include the word "only" when referring to petitions by the Attorney General and employees. See *Wood v. National Railroad Passenger Corp.*, 341 F. Supp. 908, 911 (D.C. Conn. 1972).

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[6] (continued)

interests of those members. See, *e.g.*, *National Motor Freight Traffic Ass'n v. United States*, 372 U.S. 246, 83 S. Ct. 688, 9 L. Ed. 2d 709 (1963); *Environmental Defense Fund, Inc. v. Hardin*, 138 U.S. App. D.C. 391, 428 F.2d 1093 (1970); *Lodge 1858, American Federation of Government Employees v. Paine*, 141 U.S. App. D.C. 152, 436 F.2d 882 (April 21, 1970); *Curran v. Laird*, 136 U.S. App. D.C. 280, 420 F.2d 122 (1969) (*en banc*); *United Federation of Postal Clerks v. Watson*, 133 U.S. App. D.C. 176, 409 F.2d 462, *cert. denied, Blount v. United Federation of Postal Clerks*, 396 U.S. 902 S. Ct. 212, 24 L. Ed. 2d 178 (1969); *Office of Communication of the United Church of Christ v. FCC*, 123 U.S. App. D.C. 328, 359 F.2d 994 (1966); *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968); *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied, Consolidated Edison Co. of New York, Inc. v. Scenic Hudson Preservation Conference*, 384 U.S. 941, 86 S. Ct. 1462, 16 L. Ed. 2d 540 (1966).

[7] Section 307 is set out on pp. 2-3, *supra*.

Another provision of the Act shows that Congress knew how to make itself abundantly clear when it wanted to limit judicial review. Section 202, 45 U.S.C., §522, provides that the original designation of the basic system by the Secretary of Transportation "shall not be reviewable in any court."

Petitioners argue that the intent of Congress to limit judicial review is clear because "the significant fact in the legislative history is that Congress considered but rejected a proposed amendment to Section 307 that would have authorized any aggrieved person to sue to enjoin violations of the Act." (Pet. Br., p. 14). The Court below thoroughly analyzed this contention and rejected it.

> In the instant case we are unable to draw inferences from the legislative history with any confidence. The proposed amendment was never debated or criticized by members of Congress so that failure to adopt the amendment might reasonably be construed to be congressional rejection of that which the amendment provided for. *Compare National Automatic Laundry & Cleaning Council v. Shultz*, 143 U.S. App. D.C. 274, 291, 443 F.2d 689, 706 (1971). The Committee might well have believed, notwithstanding the remarks of railway labor representatives, that Section 307 as originally drafted did not bar suits by all injured and aggrieved parties. Indeed, the only mention of the scope of Section 307 during debate on the floor of Congress suggests that Congress interpreted the section to permit such suits. (SA 36).

In its section-by-section analysis of the provisions of the Act, the Committee on Interstate and Foreign Commerce

did not discuss Section 307 in terms of limiting judicial review, but rather in terms of "authorizing" access to the courts that might otherwise have been questionable:

> Section 307 authorizes the Attorney General of the United States to sue the corporation or any railroad to prevent acts of omission or commission in violation of this legislation. In the case of labor agreements, individual employees or duly authorized employee representatives may sue for equitable relief. H.R. Rep. No. 91-1580, *supra*, p. 9.

As the court in *Wood v. National Rail Passenger Corp.*, *supra*, at 911-912, noted:

> The express authority of the Attorney General to petition for equitable relief against the corporation or any railroad may have been deemed necessary to resolve doubts that the United States had a sufficient "interest" under 28 U.S.C. §517 to allow him to bring suit to correct conduct of these private businesses, where non-criminal sanctions are involved.
>
> This is not the first time that Congress has recognized that the Attorney General should be given a substantial role in obtaining sanctions to obtain enforcement of responsibilities imposed on persons who carry out government-assisted projects. See, *e.g.*, 42 U.S.C. §§3611(g), 3613.

It is clear, then, that there is no "clear and convincing evidence" of a Congressional intent to restrict, severely,

judicial review of actions taken by Amtrak or a railroad allegedly pursuant to mandates contained in the Amtrak Act by barring parties aggrieved by such actions from initiating suits.

II.

ALLOWING PARTIES OTHER THAN THE ATTORNEY GENERAL, IN NON-LABOR CASES, TO CONTEST VIOLATIONS OF THE ACT WILL ASSURE COMPLIANCE WITH, AND NOT FRUSTRATE, THE PURPOSES OF THE ACT.

Petitioners contend that the decision below would seriously frustrate the purposes of the Amtrak Act, using as a major hypothetical example the alleged ills that would flow if any "aggrieved" passenger were allowed to contest a proposed discontinuance of an Amtrak train. (Pet. Br., pp. 24-27).

As indicated above, discontinuances are governed by Section 404 of the Act, 45 U.S.C., §564. That section provides, among other things, that proposed discontinuances by Amtrak after July 1, 1973 of trains in the basic system can take effect only after the procedures of Section 13a of Title 49 are followed. 45 U.S.C., §564(b)(3). In addition, railroads which have not contracted with Amtrak are prohibited from discontinuing intercity passenger train service until January 1, 1975, after which date train service operated by such railroads may be discontinued, again pursuant to the provisions of Section 13a of Title 49.

Section 13a of Title 49 (49 U.S.C., §13a) contains a rather elaborate set of procedures that Amtrak and the railroads must follow prior to discontinuing any train operation, including the possibility of an investigation by the

I.C.C.[8] To discontinue intrastate trains. Amtrak must seek permission from the appropriate state authority. 49 U.S.C., Section 13a(2). The results of an investigation by the I.C.C. has been held by this Court to be appealable by interested parties, pursuant to 28 U.S.C., §1336(a). *City of Chicago v. United States*, 396 U.S. 162, 24 L. Ed. 2d 340, 90 S. Ct. 309 (1969). As this Court stated in *City of Chicago v. United States, supra*, at 164, 24 L. Ed. 2d 340, 343:

> Certainly under §13a(1) the carrier, if overruled by the Commission, could obtain review. We can find no talismanic sign indicating that Congress desired to deny review to opponents of interstate discontinuances alone.

Also, as described above (pp. 8-10), Congress has mandated a large role for State and local authorities in the

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[8] Several investigations by the I.C.C. of proposed discontinuance by Amtrak are presently taking palce. See I.C.C. Finance Docket No. 27436, *National Railroad Passenger Corporation (Amtrak) – Discontinuance of Trains Nos. 30 & 31, 530 & 531– Between New York, New York/Washington, D.C., and Kansas City, Missouri (National Limited)*; ICC Finance Docket No. 27437, *National Railroad Passenger Corporation (Amtrak) – Discontinuance of Trains Nos. 52 & 53 Between Chicago and St. Petersburg/Miami, Florida (The Floridian)*; and I.C.C. Finance Docket No. 27438, *National Railroad Passenger Corporation (Amtrak) Discontinuance of Train Nos. 98 and 99 Between Newport News and Richmond, Virginia, (The George Washington/James Whitcomb Riley)*.

Consistent with Amtrak's concern in this case that accountability in the courts for their actions is too heavy a "burden" to bear, the Department of Transportation has requested, but not received, from Congress, a change in the discontinuance procedures Amtrak is presently required to follow. *Report to Congress, The Rail Passenger Service Act of 1970*, pp. 104-105 (March, 1973).

to contest violations of the Act will not frustrate, but rather will ensure timely compliance with, the purposes of the Act.

III.

SECTION 307 DOES NOT DEPRIVE THE DISTRICT COURTS OF JURISDICTION OVER SUITS BROUGHT BY PARTIES OTHER THAN THE ATTORNEY GENERAL IN NON-LABOR CASES.

Petitioners contend that Section 307 restricts access to the district courts, on jurisdictional grounds, to the Attorney General, employees, and employee representatives. (Pet. Br., pp. 29-34).

The Court below rejected this contention for essentially the same reasons it rejected the argument that only the Attorney General, in non-labor agreement cases, has standing to sue Amtrak or a railroad for violations of the Act, holding that the jurisdiction of the district court may rest on 28 U.S.C., §1337.[9]

Prior to passage of the Amtrak Act, train discontinuances had to be approved by either the State Commissions or by the Interstate Commerce Commission, pursuant to 49 U.S.C., §13a. 49 U.S.C., §13a(2), for example, requires that application for approval of discontinuances of intrastate trains must first be made to the appropriate state agency. This Court, in rejecting a contention that requiring the railroads to seek relief first from a State agency

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[9] 28 U.S.C., §1337 provides that "the district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

for its intrastate train operations would frustrate the purpose of Congress in enacting §13a, stated:

> "That purpose was, as the court below observed, remedial. But it was conditioned by a desire to protect state jurisdiction over local operations. To ignore this we conclude was error."

New Jersey v. New York, S. & W. R. Co., 372 U.S. 1, 9, 9 L. Ed. 2d 541, 546, 83 S. Ct. 614 (1963).

In the instant case, petitioners argue that the "Amtrak Act expressly embodies a radical departure from past practice," using as an example the discontinuance provisions of 45 U.S.C., §561(a). (Pet. Br., p. 33, n. 34). Petitioners fail to point out, though, that the "radical departure" for discontinuances was limited in time. After July 1, 1973, trains in the basic system may be discontinued by Amtrak only in accordance with the procedures of 49 U.S.C., §13a 45 U.S.C., §564(b)(3). In addition, section 13a procedures are to be employed after January 1, 1975, for discontinuances proposed by railroads which have not entered into a contract with Amtrak pursuant to 45 U.S.C., §564(a)(1). 45 U.S.C., §564(a).

As the court below stated – when discussing procedures for train discontinuances prior to the Amtrak Act in relation to the accessibilitiy of the district courts by aggrieved parties to redress violations of the Act (SA 45):

> Passenger groups and other affected parties were allowed to intervene and argue their cases in these forums. We cannot help but believe that if Congress had wanted to take away these rights it would have done so in a more explicit fashion. Thus for the same reasons that we found no congressional intent in Section 307 to overcome the strong

> presumption of standing in favor of persons intended to be protected by legislation, we now find no congressional intent to overcome the general jurisdictional grant in Section 1337.

Petitioners rely extensively on the decision by this Court in *Switchmen's Union of North America v. National Mediation Board*, 320 U.S. 297, 88 L. Ed. 61, 64 S. Ct. 95 (1943), to support their contention that the courts have no jurisdiction to entertain this suit. However, that case is distinguishable from the instant one not only for the excellent reasons given by the court below (SA 44-45), but also because considerable discretion is lodged in Amtrak and the railroads for taking, or not taking, actions which affect the location and availability of rail passenger service in this country.

In *Switchmen's Union, supra*, this Court described the functions of the Mediation Board under the act in question as "more the function of a referee" with "no discretion to take or withhold action." 320 U.S. at 304, 305, 88 L. Ed. at 66.

A characterization of Amtrak as merely a "referee" with no "discretion to take or withhold action" would be totally inappropriate.

For example, 45 U.S.C., §564(b)(3) provides that trains in the basic system which Amtrak determines are not required by public convenience and necessity "*may* be discontinued." 45 U.S.C., §564(b)(2) provides: "Except as provided in section 563(a) of this title, service beyond that prescribed for the basic system undertaken by the Corporation upon its own initiative *may be discontinued at any time.*" 45 U.S.C., §563(a) provides, in part: "The Corporation *may provide* intercity rail passenger service in excess of that prescribed for the basic system, ..." (Underscores all supplied).

Finally, petitioners contend that the respondents are barred from instituting this action because the Amtrak Act does not explicitly provide for private causes of action. (Pet. Br., pp. 34-36).

Such a contention lacks persuasiveness in light of this Court's opinions in *J. I. Case Co. v. Borak*, 377 U.S. 426, 12 L. Ed. 2d 423, 84 S. Ct. 1555 (1964), and *Allen v. State Board of Elections*, 393 U.S. 544, 22 L. Ed. 2d 1, 89 S. Ct. 817 (1969). As the Court stated in the *Allen* case, *supra*, at 557, 22 L. Ed. 2d at 12:

> We have previously held that a federal statute passed to protect a class of citizens, although not specifically authorizing members of the protected class to institute suit, nevertheless implied a private right of action. In J. I. Case Co. v. Borak, 377 US 426, 12 L Ed 2d 423, 84 S Ct 1555 (1964), we were called upon to consider §14(a) of the Securities Exchange Act of 1934. 48 Stat 895, 15 USC §78n(a). That section provides that it shall be "unlawful for any person . . . [to violate] such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." We held that "[w]hile this language makes no specific reference to a private right of action, among its chief purposes is 'the protection of investors,' which certainly implies the availability of judicial relief where necessary to achieve that result." 377 US, at 432, 12 L Ed 2d at 427.

The Court further pointed out in the *Allen* case, when commenting upon a provision in the Voting Rights Act

permitting the Attorney General of the United States to institute actions to enforce provisions of that Act: "The achievement of the Act's laudable goal could be severely hampered, however, if each citizen were required to depend solely on litigation *instituted at the discretion of the Attorney General.*" 393 U.S. 566, 12 L. Ed. 2d at 12. (Underscore supplied).

Certainly, railroad passengers – present and future – were intended to be prime beneficiaries of the passage of the Amtrak Act. Petitioners attempt to distinguish this case from the *J. I. Case Co.* and *Allen* cases, *supra,* by suggesting that "possible violations of the Amtrak Act are not so numerous" as to overwhelm the resources available to the Attorney General for monitoring the Act. (See Pet. Br., p. 35, n. 36). This argument is rather curious, given petitioners' fears, expressed earlier in their brief (Pet. Br., pp. 22-23), that allowing access to the courts by potentially aggrieved parties, including the "several million passengers" across the country, will seriously frustrate the purposes of the Act.

Furthermore, as indicated above, Congress made discontinuances by Amtrak of basic system trains after July 1, 1973, (and discontinuances by the railroads after January 1, 1975) expressly subject to the provisions of Section 13a of the Interstate Commerce Act. Section 13a proceedings before the I.C.C. typically involve a large number of participants, including State Commissions. Appeals to the courts from I.C.C. decisions in Section 13a proceedings have been assured by this Court in *City of Chicago v. United States, supra.*

Since Congress, among other things, provided that discontinuances by Amtrak and the railroads shall be subject

to extensive public scrutiny and eventual accountability in the courts, it can hardly be argued, as petitioners do here, that Congress intended, by the provisions of Section 307 of the Act, to make the Attorney General the sole arbiter, in non-labor cases, as to when actions taken by the Corporation or by the railroads pursuant to the Act should be contested in the courts.

CONCLUSION

For the foregoing reasons, the judgment of the Court below should be affirmed.

Respectfully submitted,

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